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 7 LIBERTY LIFE ASSURANCE COMPANY OF
 BOSTON

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

10
 11 TERREL HOFFMAN,
 12 Plaintiff,
 13 v.
 14 LIBERTY LIFE ASSURANCE
 15 COMPANY OF BOSTON; SYNOPSYS,
 INC. LONG TERM DISABILITY PLAN,
 16 Defendants.

CASE NO. CV 08-00301 JF (HRL)

**DEFENDANT LIBERTY LIFE ASSURANCE
 COMPANY OF BOSTON'S OPPOSITION
 TO PLAINTIFF'S MOTION FOR
 PROTECTIVE ORDER AND TO QUASH
 SUBPOENA**

Date: August 19, 2008
 Time: 10:00 a.m.
 Courtroom: 2
 Judge: Honorable Howard Lloyd

17
 18 **I. INTRODUCTION**

19 Plaintiff's motion for a protective order and motion to quash the records subpoena served
 20 upon plaintiff's former employer, Synopsys, Inc., must be denied because the information sought
 21 is directly relevant to plaintiff's ability to bring this action. In an ERISA action, such as here,
 22 extrinsic evidence outside of the administrative record may not be used when considering *whether*
 23 *the claim administrator abused its discretion* in denying benefits. However, relevant evidence
 24 supporting a defendant's affirmative defense, which does not open up or require an interpretation
 25 of the administrative record, is permissible.

26 In or around September 2004, plaintiff submitted a claim for long-term disability benefits
 27 under a Group Disability Income Policy issued by defendant Liberty Life Assurance Company of
 28 Boston ("Liberty") to Synopsys. Approximately one month later, plaintiff was terminated from

1 her employment and signed a severance agreement. Plaintiff did not provide this agreement to
2 Liberty during its handling of her claim nor did Synopsys, so Liberty was not aware of it during
3 the claim. Following a thorough investigation and evaluation of the information obtained,
4 Liberty denied plaintiff's claim and she subsequently filed suit. Thereafter, Liberty's counsel
5 learned of the existence of the severance agreement. Because this agreement may contain
6 language that releases or waives plaintiff's right to employee benefits, which may include
7 disability income benefits at issue, and any and all claims to these benefits, Liberty issued a
8 subpoena to Synopsys in order to obtain a copy.

9 Plaintiff objected to the subpoena on the ground that discovery is not permitted in an
10 ERISA action. In addition, she contends that to allow such discovery would be unfair, as she
11 would not now be permitted to submit additional medical evidence in support of her claim.
12 Plaintiff's argument mixes apples and oranges. While discovery aimed at challenging the
13 propriety of Liberty's claim decision is improper in an ERISA suit because the review is limited
14 to the administrative record, the severance agreement does not relate to the propriety of Liberty's
15 claim decision, but instead supports a possible affirmative defense of waiver and release.
16 Accordingly, this information would not impermissibly open up the administrative record, but
17 rather answers the question of whether plaintiff can bring her claim at all, regardless of whether it
18 has any merit.

19 **II. STATEMENT OF FACTS**

20 **A. The Claim**

21 This ERISA action arises out of the denial of plaintiff's claim for long-term disability
22 income benefits under a Group Income Disability Policy ("the Policy") issued by defendant
23 Liberty Life Assurance Company of Boston to plaintiff's former employer, Synopsys. Plaintiff
24 worked full-time as a Senior Technical Publications Writer from September 4, 2001 until May 17,
25 2004, her last day of full-time work. Plaintiff continued to work on a part-time basis until she
26 was laid off from her employment on October 22, 2004.

27 In or around September 2004, plaintiff submitted a claim for long-term disability benefits
28 based upon bilateral elbow tendonitis, cubital tunnel syndrome, and overuse of her right shoulder

1 and hand as a result of excessive use of the computer keyboard and mouse. Liberty began its
2 investigation and requested medical records from plaintiff and plaintiff's treating physician. The
3 documentation obtained indicated that plaintiff's primary treating provider, physiatrist Dr. Sunita
4 Jayakar, consistently released plaintiff back to work for up to six hours a day. In addition, Dr.
5 Jayakar completed an Attending Physician Statement wherein she opined that plaintiff had a class
6 three physical impairment, which equated to slight limitation of functional capacity, capable of
7 light work.

8 Consulting physician Dr. Brian Foley then reviewed plaintiff's medical records and
9 provided a report per Liberty's request. Dr. Foley opined that the medical documentation and
10 diagnostic testing did not demonstrate any evidence to support plaintiff's work-related
11 restrictions. Therefore, on January 17, 2005, Liberty concluded that plaintiff was not disabled
12 from her own occupation in accordance with the terms of the Policy and denied her claim.

13 On July 14, 2005, plaintiff appealed the claim decision and submitted additional
14 information. On December 12, 2005, Liberty upheld its decision to deny plaintiff's claim.
15 Liberty's determination on appeal was supported by the medical records; a peer review by a
16 board certified neurologist and a vocational analysis.

17 **B. The Lawsuit**

18 On January 16, 2008, plaintiff filed suit in the U.S. District Court for the Northern District
19 of California, alleging claims for breach of the Employee Retirement Income Security Act of
20 1974 ("ERISA") against Liberty and the Synopsis Long Term Disability Plan ("the Synopsis
21 Plan"). On May 8, 2008, plaintiff and Liberty entered into a stipulation to dismiss the Synopsis
22 Plan from this action.

23 **C. Liberty's Records Subpoena to Synopsis, Inc.**

24 During a telephone conversation with counsel for Synopsis on June 6, 2008, Liberty
25 learned for the first time that plaintiff had signed a severance agreement upon termination of her
26 employment. (Williams Decl., ¶¶2, 3.) Because such an agreement may contain language that
27 releases or waives plaintiff's right and claim to disability income benefits, Liberty served a
28 records subpoena upon Synopsis on June 12, 2008. Pursuant to the subpoena, Liberty requested

1 a copy of plaintiff's employment file, including her personnel records, all documents regarding
2 her claim for workers' compensation benefits, and any severance agreements and other documents
3 related to her termination. (Exh. 1 to Perkins Decl.) Plaintiff objected to the subpoena and
4 demanded that Liberty withdraw it, on the ground that there was no discovery allowed in ERISA
5 actions. (Exh. 2 to Perkins Decl.)

6 On June 30, 2008, the parties engaged in a telephonic meet and confer session wherein
7 defense counsel advised plaintiff that Liberty was not limited to the administrative record in order
8 to assert an affirmative defense. Rather, Liberty was entitled to obtain evidence which may
9 establish that plaintiff's action is barred because she expressly released her claim for employee
10 benefits pursuant to a severance and release agreement. Therefore, while Liberty would not
11 withdraw its subpoena, it offered to narrow the scope to only information pertaining to plaintiff's
12 termination and the severance agreement. (Williams Decl., ¶4.)

13 Nonetheless, plaintiff continued to object to the subpoena in its entirety. (See, Exh. 3 to
14 Perkins Decl.) In response, on July 8, 2008, defense counsel wrote a follow-up letter to plaintiff
15 reiterating its position and again offering to narrow the scope of the subpoena to only information
16 related to plaintiff's employment contracts, severance agreements, and other documents related to
17 plaintiff's termination, including but not limited to all correspondence, electronic mail, notes,
18 drafts, agreements, and instructions. (Williams Decl., ¶5, Exh. 4 to Perkins Decl.)

19 In the interim, on July 9, 2008, defense counsel spoke again with counsel for Synopsys to
20 advise of the status of the subpoena. At this time, Liberty learned that plaintiff had just requested
21 and obtained a copy of the severance agreement at issue. (Williams Decl., ¶6.) Therefore,
22 defense counsel called plaintiff's counsel on July 11, 2008 to see if a compromise could be
23 reached. Plaintiff's counsel stated that although he did not find any indication in the agreement
24 that plaintiff waived her rights to disability benefits, plaintiff would not allow Liberty access to it.
25 (Williams Decl., ¶7.) Accordingly, on July 15, 2008, plaintiff proceeded with filing her motion
26 to quash. (Williams Decl., ¶8.)

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28

1 **III. LEGAL ANALYSIS**

2 **A. Liberty Is Entitled to Information Relating to Plaintiff's Ability to Bring Her**
3 **Claim As It Does Not Open Up the Administrative Record.**

4 Plaintiff cites a plethora of case law in an effort to support her contention that discovery is
5 not allowed in this case because the Court is limited to the administrative record in its review of
6 whether Liberty abused its discretion in denying plaintiff's claim, to which Liberty agrees.
7 However, plaintiff offers no authority supporting her assertion that discovery aimed at exploring a
8 defendant's affirmative defense of waiver or release is prohibited in an ERISA action.

9 Plaintiff's reliance on *Opeta v. Northwest Airlines Pension Plan for Contract Employees*,
10 484 F.3d 1211 (9th Cir. 2007) is misplaced. In *Opeta*, the Court held that it would have been
11 error to admit evidence of a surveillance videotape demonstrating plaintiff was not disabled,
12 because it was not part of the administrative record. However, the videotape evidence went
13 directly to the reasonableness of the defendant's claim decision and the issue of whether it abused
14 its discretion in denying disability benefits. In contrast, the evidence of the severance agreement
15 does not go to the merits of the claim determination, but whether plaintiff can bring her claim at
16 all. The information sought by Liberty's subpoena goes directly to exploring an affirmative
17 defense, and is therefore permissible. (*Parisi v. Kaiser Foundation Health Plan Long Term*
18 *Disability Plan*, 2008 U.S. Dist. LEXIS 5770 (N.D Cal. 2008).)

19 In *Parisi*, plaintiff submitted a claim for long-term disability benefits one year after his
20 employment was terminated. Upon his termination, plaintiff signed a severance and release
21 agreement in which he released any claims of any kind relating to his employment, expressly
22 including claims under ERISA. Met Life denied plaintiff's claim for benefits based upon three
23 independent physicians who separately opined he was not functionally impaired from performing
24 sedentary work, and was therefore not disabled from his own occupation. The denial was not
25 premised upon the release nor was the release part of the administrative record. Plaintiff then
26 brought suit challenging the denial, to which Met Life responded that plaintiff had released his
27 claims by executing the agreement and was therefore barred from bringing the action. The Court
28 rejected plaintiff's argument that it could not consider the agreement because it was not included

1 in the administrative record. The Court held:

2 The Court does not find that the review of the Release is similar to
 3 the admission of post-denial medical evidence. **Here, the Court is**
4 not opening up the administrative record or reviewing the
5 administrator's denial under an abuse of discretion standard.
6 Rather, the Court reviews the Release as part of Defendant's
7 affirmative defense of waiver and, because the agreement is
8 central to the relationship between the parties, the Court finds it
9 material.

10 (Id. at *9.) (Emphasis added.) Accordingly, the Court granted summary judgment for defendant
 11 on its affirmative defense of waiver. (Id. at *11). (See also, *Orndorf v. Paul Revere Life Ins. Co.*,
 12 404 F.3d 510, 520 (1st Cir. 2005) [noting that outside evidence may be relevant where the
 13 challenge is not to the merits of the decision to deny benefits].)

14 Similarly, Liberty is not limited to the administrative record in order to assert an
 15 affirmative defense. Liberty is entitled to obtain evidence which may establish that plaintiff's
 16 action is barred because she expressly released her claim for employee benefits pursuant to a
 17 severance agreement. Plaintiff's argument that it would be unfair to allow Liberty access to this
 18 information because a plaintiff could not submit additional medical information after his or her
 19 claim was closed is without merit. Additional medical documentation would open up the
 20 administrative record and goes directly to the merits of Liberty's claim decision. Such is not the
 21 case with the severance agreement. Instead, it determines whether plaintiff is barred from
 22 bringing her claim in its entirety. Liberty is entitled to bring a defense to actively protect its
 23 interests in this case.

24 Additionally, as demonstrated by *Parisi*, the fact that this information existed before
 25 Liberty processed and denied plaintiff's claim, but Liberty did not have a copy of it nor rely on it
 26 for its denial, does not prevent Liberty from being able to assert it now during litigation. Liberty
 27 was not aware of the existence of this agreement during its investigation of the claim. Plaintiff
 28 advised Liberty that she was laid off from her employment,¹ but she did not inform Liberty that
 she had signed a severance agreement or that she may be prevented from seeking disability

27 ¹ This information was also contained in some of plaintiff's medical records, as she had also informed her treating
 28 physicians that she had been laid off from her employment. Again, however, she did not mention to her physicians
 that she had also signed a severance agreement.

1 benefits. Liberty claims personnel are not attorneys and there has been no waiver of Liberty's
 2 right to evaluate such a legal defense at this time simply because its claims handler did not
 3 request a severance agreement that was not known to exist during the claim.

4 **B. Because Liberty's Discovery is Not Aimed at the Merits of the Claim Decision,
 The Subpoena is Relevant and Permissible.**

5 Where, as here, the policy unambiguously confers discretionary authority on the claim
 6 administrator to construe the terms of the plan and determine eligibility for benefits, the
 7 applicable standard of review is an abuse of discretion. (*Met Life Ins. Co. v. Glenn*, 2008 U.S.
 8 Dist. LEXIS 5030, *11 (2008); *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 958 (9th Cir.
 9 2006).) Moreover, plaintiff agrees that the applicable standard of review in this case is abuse of
 10 discretion. (Pltf's Motion, p6, lines 19-20.) Therefore, it is unnecessary to address the
 11 permissible discovery in a case under *de novo* review or the cases cited by plaintiff to that effect.

12 Because the abuse of discretion standard of review applies here, the Court may review
 13 only the administrative record when considering whether the plan administrator abused its
discretion. (*Abatie*, 458 F.3d at 970 (emphasis added).) Thus, discovery aimed at challenging the
 14 propriety of the decision is improper, although limited discovery may be permitted to establish a
 15 conflict of interest. (*Id.* at 970.) Liberty does not dispute these general principles.

16 Here, by contrast, the information sought by Liberty is not aimed at the merits of the claim
 17 decision nor is it tied into the requirements and regulations of ERISA. Evaluation of the viability
 18 of the severance agreement does not require interpretation of the policy, the plan documents,
 19 ERISA, or the administrative record. It merely requires interpretation of the plain language of the
 20 agreement. The severance agreement does not go to whether Liberty abused its discretion or
 21 acted with a conflict of interest, but whether plaintiff is entitled to bring this action at all.
 22 Accordingly, the principles and limitations set forth in *Abatie* regarding the consideration of
 23 extrinsic evidence in an ERISA case do not apply to the circumstances at issue here.

24 **C. Liberty Is Entitled to Discovery on Plaintiff's Severance Agreement Because
 Waiver of Benefits under ERISA Is a Viable Defense.**

25 Plaintiff does not contend that the severance agreement is irrelevant. A person's ability to
 26 release his or her rights under ERISA is well established. (*Rodriguez-Abreu v. Chase Manhattan*

1 *Bank*, 986 F.2d 580, 588 (1st Cir. 1993).) Thus, a severance and release agreement signed upon
2 termination of employment can operate to bar a plaintiff's claim for disability benefits under
3 ERISA. (*Piehl v. Metropolitan Life Ins. Co.*, 2005 U.S. Dist. LEXIS 4619 (D. Or. 2005); *Bennett*
4 *v. CNA Insurance Companies*, 2001 U.S. Dist. Lexis 107 (N.D. Ca. 2001).) Plaintiff asserts that
5 *Piehl* and *Bennett* are not applicable because the release agreements in those cases were part of
6 the administrative record and thus, the defendants did not try to engage in discovery. While these
7 cases are not directly on point with respect to discovery, they nonetheless establish that the
8 affirmative defense of waiver and release based upon a severance agreement is a viable defense.
9 (See also, *Smart v. The Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 177-178 (1st Cir.
10 1995).)

11 In *Hallstead v. Liberty Life Assurance Co. of Boston*, Case No. SA CV05-0735 DOC
12 (MLGx) (C.D. Cal., April 12, 2006), the plaintiff filed an ERISA action challenging the denial of
13 her claim for long-term disability benefits. The Court granted defendant's motion to file and
14 serve an Amended Answer in order to add an affirmative defense based on a general release
15 plaintiff had signed with her employer. (Williams Decl., Exh. B.) Defendant was not aware of
16 the existence of the release during the investigation of plaintiff's claim. Thus, the release was not
17 contained in the administrative record nor was it used as a basis for the denial. Rather, Liberty
18 obtained a copy of the release from plaintiff's former employer during litigation. Yet, despite that
19 the release was not part of the administrative record, the *Hallstead* Court permitted defendant to
20 use it in support of its affirmative defense that plaintiff's ERISA suit was barred. If the end result
21 is permissible, certainly a subpoena (or a request to plaintiff to produce the agreement her
22 attorney now has) to obtain the severance and release agreement is also permissible.

23 Furthermore, on June 27, 2008, plaintiff submitted a Supplement to Initial Disclosures,
24 which includes a copy of the Order Approving Compromise and Release in plaintiff's workers'
25 compensation claim. (Williams Decl., ¶9, Exh. A.) This information is within the scope of the
26 subpoena served on Synopsys and was not contained in the administrative record but may be
27 relevant to the issue of damage calculation. Plaintiff cannot contend that she is entitled to rely on
28 information outside the administrative record to support her assertion that she has a right to

1 pursue her claim, while at the same time denying Liberty access to information to dispute it.

2 Liberty is entitled to information which may support its contention plaintiff's claims are barred.

3 **D. Allowing Liberty To Obtain the Severance Agreement Promotes Efficiency In**
This Matter.

4 Under the terms of the Policy, a covered person is entitled to 24 months of "own
5 occupation" benefits if she is found to be disabled from performing all of the material and
6 substantial duties of her own occupation. After 24 months of benefits have been paid, a covered
7 person is entitled to continued long-term disability benefits if she is found to be unable to perform
8 all of the material and substantial duties of her own or any other occupation for which she is
9 reasonably fitted by training, education, experience, age and physical and mental capacity.

10 On January 17, 2005, Liberty concluded that plaintiff did not meet the definition of
11 disabled from her own occupation and denied her claim. Liberty did not investigate nor make a
12 determination as to whether plaintiff was disabled from the material and substantial duties of any
13 occupation. Thus, should plaintiff prevail in this matter and Liberty is found to have abused its
14 discretion, her claim would then be remanded back to Liberty to determine her eligibility for "any
15 occupation" benefits and Liberty would request and obtain the severance agreement from
16 Synopsys at that time. Should the agreement waive plaintiff's rights and claims to disability
17 income benefits, Liberty would necessarily be entitled to reimbursement for the own occupation
18 benefits paid and plaintiff would be barred from seeking additional benefits. As plaintiff
19 acknowledges in her moving papers, one of the primary goals of ERISA is to provide a method
20 for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously.
21 (*Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 11469, 1479 (9th Cir. 1993)). Accordingly, in the
22 interest of promoting cost-effectiveness and efficient decision making, this issue should be
23 resolved now.

24 **E. Plaintiff Provides No Basis For Her Request for a Protective Order.**

25 Rule 26(b)(1) permits discovery regarding any non-privileged matter that is relevant to
26 any party's claim or defense. However, a protective order may be issued, upon "good cause" to
27 "protect a party or person from annoyance, embarrassment, oppression, or undue burden or

1 expense.” (Fed.R.Civ.Pro 26(c); *Sullivan v. Prudential Ins. Co. of Am.*, 233 F.R.D. 573, 575,
 2 2005 U.S. Dist. LEXIS 40941 (C.D. Cal. 2005).) Plaintiff’s only argument is that Liberty cannot
 3 engage in discovery to obtain a copy of the severance agreement because this is an ERISA action.
 4 She does not claim that the agreement is irrelevant, confidential, or protected, or that providing
 5 the agreement would cause annoyance, embarrassment, oppression, undue burden or expense.
 6 Rather, plaintiff merely asserts that the agreement is not discoverable because of what plaintiff
 7 has coined the “Administrative Remedy Rule.” Accordingly, plaintiff offers no basis for seeking
 8 a protective order and thus, her motion for a protective order must be denied.

9 **IV. CONCLUSION**

10 The information sought by Liberty does not go to the propriety of the claim decision nor
 11 does it open up the administrative record. Rather, the information relates to whether plaintiff is
 12 entitled to bring her claim at all. The evidence of the severance agreement is relevant to
 13 exploring a possible affirmative defense in this matter and Liberty will amend its answer to assert
 14 this defense if the severance agreement contains a release of plaintiff’s ERISA benefits.
 15 Therefore, plaintiff’s objections to the records subpoena served on Synopsys are improper and
 16 Liberty respectfully requests the Court deny plaintiff’s motion for a protective order and motion
 17 to quash.

18 Dated: July 29, 2008

19 ROPERS, MAJESKI, KOHN & BENTLEY

20 By:

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